

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PAUL ROGERS,
Plaintiff,
v.
CAROLINE HARDY, *et al.*,
Defendants.

Case No. C05-5231 FDB/KLS

REPORT AND RECOMMENDATION

**NOTED FOR:
JUNE 22, 2007**

This civil rights action has been referred to United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Plaintiff is a Washington State prison inmate currently incarcerated at Stafford Creek Corrections Center (SCCC). Plaintiff claims that SCCC mailroom employees wrongfully withheld his legal mail for four days, causing him to miss a deadline for filing his personal restraint petition in state court. Presently before the Court is the motion for summary judgment of Defendants Caroline Hardy, Cheryl Sullivan, Van Redding, Lester Tuffree, and Paul Sturm.¹ (Dkt. # 60). Having carefully reviewing the motion, Plaintiff's response (Dkt. # 61), and Defendants' reply (Dkt. # 62), the undersigned recommends that

¹Defendant Byron Jamtass has not been served with the summons and complaint and is, therefore, not a party to this lawsuit and is not represented by counsel.

REPORT AND RECOMMENDATION- 1

1 Defendants' motion should be granted and Plaintiff's claims against Defendants be dismissed with
2 prejudice.
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5 **I. STATEMENT OF FACTS**

6 The following facts are not in dispute. Plaintiff is in the custody of DOC pursuant to a
7 judgment and sentence entered in Pierce County on October 7, 2002. (Dkt. # 60, Exh. 1, Attach. A
8 at 1). Pursuant to RCW 10.73.090(1) there is a one year limit on collateral attack of a judgment and
9 sentence in a criminal case. The deadline for Plaintiff to submit a Personal Restraint Petition (PRP)
10 collaterally attacking his judgment and sentence was October 7, 2003. Plaintiff and his counsel,
11 Cynthia Jordan, prepared a PRP challenging the calculation of his sentence. Jennifer Dean, legal
12 assistant to Cynthia Jordan, mailed the personal restraint petition to Plaintiff on Wednesday, October
13 1, 2003 via overnight/next day air delivery. (Dkt. # 14 at 8-9).

15 In October 2003, there were approximately 1,879 inmates residing at SCCC. (Dkt. # 60,
16 Exh. 2). In that month, the mailroom processed approximately 16,960 pieces of standard sized
17 incoming mail, 9,790 pieces of oversize pieces of mail, 798 packages from United Parcel Service and
18 United States Postal Service, 993 pieces of certified/legal mail. (*Id.*). Although sent via
19 overnight/next day air delivery, the mail in question was noted as received by the mailroom on
20 Friday, October 3, 2003 at 2:08 p.m. (*Id.*, Exh. 2 and Attach. C). Correctional Office Redding
21 entered the legal mail addressed to Plaintiff from the Jordan Law Offices into the Pitney Bowes Mail
22 record and tracking system. (*Id.*). In accordance with DOC Policy Directive, 450.100, Mail for
23 Offenders, and practice, Plaintiff's legal mail was delivered to him on the next business day, Monday,
24 October 6, 2003. (*Id.*). On that same day, Plaintiff mailed his PRP to the Court of Appeals, Division
25 III.

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28 REPORT AND RECOMMENDATION- 2

1 According to SCCC mailroom practice, Plaintiff's PRP left SCCC on October 7, 2003. (Dkt.
 2 # 60, Exh. 2). The Court of Appeals received Plaintiff's PRP on October 9, 2003. (Dkt. # 14 at 8
 3 and Dkt. # 7 at Exh. 2²). Pursuant to RAP 18.6(c), in existence in 2003, Plaintiff's petition had to be
 4 received by the Court of Appeals on the deadline date in order to be considered timely filed. RAP
 5 18.6(c)(2000). Plaintiff's PRP was not accepted for review by the Court of Appeals because it was
 6 filed two days late. (*Id.*).

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9 **II. DISCUSSION**

10 **A. Standard of Review**

11 Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment "if the pleadings,
 12 depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that
 13 there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of
 14 law." Fed. R. Civ. P. 56 (c). The moving party is entitled to judgment as a matter of law when the
 15 nonmoving party fails to make a sufficient showing on an essential element of a claim on which the
 16 nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985).

17 There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a
 18 rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*
 19 *Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence,
 20 not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56 (e). Conversely, a genuine dispute
 21 over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring
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26 ²The face sheet of Plaintiff's PRP reflects a received date stamp of October 9, 2003. (See
 27 Dkt. # 7, Exh. 2) (Exhibit 2 is not physically attached to Plaintiff's Second Amended Complaint
 28 (Dkt. # 14), but it is referenced in Attachment A to the Second Amended Complaint.

1 a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
 2 242, 253 (1986); *T. W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626,
 3 630 (9th Cir. 1987).

4 The determination of the existence of a material fact is often a close question. The court must
 5 consider the substantive evidentiary burden that the nonmoving party must meet at trial, e.g. the
 6 preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Service Inc.*,
 7 809 F.2d at 630. The court must resolve any factual dispute or controversy in favor of the nonmoving
 8 party only when the facts specifically attested by the party contradicts facts specifically attested by the
 9 moving party. *Id.*

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12 **B. Plaintiff Has Failed to State A Claim In Violation of 42 U.S.C. § 1983 And Defendants Are**
 13 **Entitled to Summary Judgment As A Matter Of Law**

14 To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1) the
 15 defendant must be a person acting under color of state law, (2) and his conduct must have deprived
 16 the plaintiff of rights, privileges or immunities secured by the constitution or laws of the United
 17 States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Implicit in the second element is a third element
 18 of causation. *See Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 286-87, (1977); *Flores v.*
 19 *Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980), cert. denied, 449 U.S. 975 (1980). When a plaintiff
 20 fails to allege or establish one of the three elements, his complaint must be dismissed. The Civil
 21 Rights Act, 42 U.S.C. § 1983, is not merely a “font of tort law”. *Parratt*, 451 U.S. at 532. That
 22 plaintiff may have suffered harm, even if due to another’s negligent conduct, does not in itself,
 23 necessarily demonstrate an abridgment of constitutional protections. *Davidson v. Cannon*, 474 U.S.
 24 344 (1986).

1 **1. Denial of Access to Courts**

2 Plaintiff contends that he was denied access to the courts in violation of his constitutional
 3 rights. Specifically, Plaintiff alleges that SCCC mailroom staff wrongfully withheld the delivery of his
 4 mail for a period of four days thus interfering with his ability to send the PRP to the Court of
 5 Appeals until the day before it was due. Consequently, his PRP was not timely and was barred from
 6 review.

7 Prison inmates possess a fundamental constitutional right of access to courts in order to
 8 contest the fact, duration and conditions of their confinement. *Bounds v. Smith*, 430 U.S. 817, 822-
 9 23 (1977). However, *Bounds* did not “create an abstract, free-standing right to access to a law
 10 library or to legal assistance.” *Id.* The provision of law libraries and legal assistance are just two
 11 methods by which a state can provide inmates meaningful access to the courts. *Lewis v. Casey*, 518
 12 U.S. 343, 349-52 (1996). If the claim does not involve the adequacy of law libraries or the adequacy
 13 of assistance, then the court must consider whether the claimant has alleged an “actual injury” to
 14 court access. *Id.* Actual injury consists of “some specific instances in which an inmate was actually
 15 denied access to the courts.” *Id.* A demonstration of actual injury does not automatically result in a
 16 right of access violation. *Id.* at 353.

17 Delays in inmate receipt of legal materials do not necessarily result in an access to courts
 18 violation “...so long as the [delays] are the product of prison regulations reasonably related to
 19 legitimate penological interests[;] such delays are not of constitutional significance, even where they
 20 result in actual injury” *Id.* at 361.

21 Plaintiff alleges an actual injury. His PRP was not considered by the Appellate Court and he
 22 alleges that this was caused by Defendants’ deliberate delay of his mail. Plaintiff did not receive his
 23 PRP until October 6, 2003 and therefore, he was not able to meet the statutory filing deadline of

1 RCW 10.73.090(1).

2 In analyzing Plaintiff's right to access, the Court must examine whether any delay in the
 3 receipt of his PRP was the product of prison regulations reasonably related to legitimate penological
 4 interests. Defendants argue that SCCC has a legitimate penological interest in providing security and
 5 safety to the public, inmates, staff and facility and in the effective management of the high volume of
 6 mail the inmates receive and generate. SCC follows DOC mail delivery policies and practices and its
 7 regulations regarding mail processing and delivery are reasonably related to its legitimate penological
 8 interests.

9 The Court must consider several factors in determining the reasonableness of the regulation
 10 at issue: (1) whether there is a "valid, rational connection" between the prison regulation and the
 11 legitimate governmental interest put forward to justify it; (2) whether there are other avenues
 12 available to the inmate; (3) the impact of the asserted right on guards or other inmates and on the
 13 allocation of prison resources generally; and (4) the absence of ready alternatives. *Turner*, 482 U.S.
 14 at 89.

15 The DOC had policy directives governing mail services in place during October 2003. (Dkt. #
 16 60, Exh. 2). The policy provides for the inspection of incoming and outgoing mail to prevent
 17 offenders from receiving or sending contraband, or any other material that threatens to undermine
 18 the security and order of the facility, through the mail; and to prevent criminal activity. (*Id.* at 2).
 19 Legal mail can only be opened in the presence of the offender and the contents are inspected to
 20 ensure that the mail is free from contraband or other material that would threaten the security and
 21 order of the facility³. (*Id.* at 7).

22 ³ DOC Policy Directive 590.500, entitled "Legal Access for Offenders" in pertinent part, sets
 23 forth the requirements for the classification of mail as "legal mail." The status of Plaintiff's PRP as

1 The SCCC mailroom manages a high volume of mail received for the approximately 2,000
 2 offenders. (Dkt. # 60, Exh. 2). The mailroom at SCCC is operational five days a week, excluding
 3 weekends and holidays. (*Id.*). Mail within SCCC is delivered and picked up Monday through Friday.
 4 (*Id.*). Mail is not logged in or delivered on Saturday or Sunday. (*Id.*). Mail arrives at SCCC in the
 5 afternoon between 1:00 p.m. and 2:30 p.m. (*Id.*). Mail delivered by Federal Express or other next
 6 day carriers is processed the same as other incoming mail. (*Id.*). Each piece of mail is scanned to
 7 check for contraband or other threatening material using an x-ray machine. (*Id.*)

8 Although not written in the policy in effect at that time, the practice was to deliver legal mail
 9 to inmates within 24 hours of receipt, excluding holidays and weekends. (*Id.*). To implement this
 10 practice, the mailroom staff sorts through the incoming mail and removes all certified and legal mail
 11 and it gives it to the Legal Mail Officer. (*Id.*). The Legal Mail Officer logs in the arrival of legal mail
 12 in the Pitney Bowes Mail Record and Tracking System (electronic log). (*Id.*). After the legal mail is
 13 logged in, the Legal mail officer enters it into facility call out system to notify the inmates that legal
 14 mail has arrived and for them to pick it up at the next business days' call out. (*Id.*). At the time the
 15 inmate picks up his legal mail he signs for it and the Legal Mail Officer logs it in as delivered. (*Id.*).
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17 Outgoing legal mail is brought by the inmate to the unit officer to log into the outgoing legal
 18 mail log. (*Id.*). The outgoing mail is picked up at 7:30 a.m. Monday through Friday. (*Id.*). All of
 19 the outgoing mail is sent out the same day that it is picked up from the units. (*Id.*). The United
 20 States Postal Service picks up the mail between 1:00 p.m. and 2:30 p.m. on Monday through Friday.
 21 (*Id.*)

22 In Plaintiff's case, SCCC's electronic log reflects that legal mail item No. 8776065089136,
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 25 legal mail is not in dispute.

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 28 REPORT AND RECOMMENDATION- 7

1 addressed to Plaintiff from the Jordan Law Office, was logged in on Friday, October 3, 2003, at 2:08
2 p.m. (*Id.*, Attach. C, Attach. D). Plaintiff's legal mail was delivered to him on Monday, October 6,
3 2003 at 12:48 pm. (*Id.*). The Legal Mail Log shows that on that same day, October 6, 2003,
4 Plaintiff submitted mail to the unit officer addressed to the Court of Appeals. (*Id.*, Attach. E).
5 Plaintiff's outgoing mail would have been picked up on October 7, 2003 at 7:30 a.m. and given to
6 the United States Postal Service worker that afternoon when he arrived to deliver and receive mail.
7 (*Id.*).
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9 Defendants argue that the SCCC practices and procedures of inspecting and delivering mail
10 in place pursuant to DOC Policy Directive 450.100 are the best means of ensuring that mail received
11 and sent from the prison does not contain contraband or other illegal material that could endanger
12 the public, inmates, staff or the facility. Alternative means of processing the high volume of mail that
13 would ensure safety and allow for expedited delivery of legal mail using the available resources, do
14 not exist. Moreover, the impact of accommodating expedited delivery of legal mail sent by
15 overnight/next day delivery carrier would be enormous in terms of staffing costs and inefficient use
16 of staffing resources. Therefore, Defendants contend that the practices and procedures utilized by
17 SCCC to implement DOC Policy Directive 450.100 are rationally related to the legitimate
18 penological interest of ensuring safety, security and effective management of the high volume of mail
19 that the prison receives.
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22 Based on a review of the undisputed evidence before it, the Court concludes that the
23 mailroom staff followed its practice of delivering legal mail within twenty-four hours of receiving it.
24 Plaintiff's legal mail was logged in on Friday afternoon and delivered on Monday afternoon. The
25 undersigned also concludes that due deference should be given to DOC's policy of inspecting mail to
26 ensure that it is free from contraband or other harmful material prior to delivery and that SCCC's
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1 chosen means of doing so are rationally related to the legitimate penological interest of ensuring
 2 safety, security and effective management of the high volume of mail that the prison receives.
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4 Plaintiff alleges that the prison's electronic record was created after the fact for litigation
 5 purposes. (Dkt. # 61 at 4). However, the Court has no evidence that this allegation is anything
 6 other than speculation. In addition, there is evidence before the Court that Plaintiff was in receipt of
 7 the electronic log as early as May 26, 2006 as part of Defendant Sullivan's Declaration. (Dkt. # 29,
 8 Exh. 4, Attach. A). Plaintiff also alleges that there are "material differences" in Defendants' sworn
 9 statements. (Dkt. # 61). In particular, Plaintiff alleges that Defendant Sullivan has changed her
 10 sworn statement (from the sworn statement given on May 26, 2006 (Dkt. # 29, Exh. 4) and that
 11 given in support of the instant motion (Dkt. # 60, Exh. 2)). The Court has read the statements
 12 together, however, and they are not different but are consistent and explain the processes and policy
 13 of SCCC for handling incoming and outgoing mail.
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15 The undisputed evidence before the Court reflects that Plaintiff's legal mail was delayed one
 16 day for inspection and was not logged in until Friday afternoon and not delivered until Monday
 17 afternoon. The undersigned concludes that this delay is not of constitutional significance, even
 18 though an actual injury, missing a statutory deadline, occurred in this case.⁴
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 21 There is no summary judgment evidence of any wrongful withholding of Plaintiff's mail. The
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23 ⁴This analysis does not change even if we assume that the PRP was received via the overnight
 24 delivery in the prison on Thursday, October 2, 2003. Based on SCCC inspection, recording, and
 25 notification processing, the earliest it could have been delivered to Plaintiff would have been the
 26 afternoon of Friday, October 3, 2003. Assuming Plaintiff reviewed and signed it on the same day he
 27 received it and deposited it into the outgoing mail system, the earliest it would have been picked up
 28 by the prison staff and sent out via the postal service would have been Monday, October 6, 2003.
 Using the actual mail delivery time period in this case of two days, the Court of Appeals would not
 have received the PRP until October 8, 2003, after the statutory filing deadline.

1 undisputed evidence shows that there are no genuine issues of material fact and the record, taken as
2 a whole, supports judgment in favor of Defendants.
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5 **2. Personal Participation of Defendants / Qualified Immunity**

6 Defendants urge, in the alternative, that they are entitled to summary judgment because
7 plaintiff has failed to set forth the specific factual bases upon which he claims each defendant is liable,
8 rather than relying solely on vague and conclusory allegations of supervisory responsibility or
9 position. *See, e.g., Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)(Defendant cannot be
10 held liable under 42 U.S.C. § 1983 solely on the basis of supervisory responsibility or position);
11 *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 n.58 (1978); *Padway v.*
12 *Palches*, 665 F.2d 965 (9th Cir. 1982). In addition, Defendants urge that they are, in any event,
13 entitled to qualified immunity from the claims of Plaintiff. As the Court has determined that Plaintiff
14 has failed to allege a deprivation of an actual constitutional right, the issues need not be reached.
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16 *See, e.g., Conn v. Gabbert*, 526 U.S. 286, 290 (1999).

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18 **III. CONCLUSION**

19 For the reasons stated above the Court should **GRANT** Defendants' motion for summary
20 judgment and dismiss Plaintiff's claims. A proposed order accompanies this Report and
21 Recommendation. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
22 Procedure, the parties shall have ten (10) days from service of this Report to file written objections.
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24 *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for
25 purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed
26 by Rule 72(b), the clerk is directed to set the matter for consideration on **June 22, 2007**, as noted in
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28

1 the caption.

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3 DATED this 23rd day of May, 2007.

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6 Karen L. Strombom
7 United States Magistrate Judge

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